# 90-983

No. ——



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

IRON WORKERS LOCAL 118,
INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNAMENTAL IRON WORKERS,
AFL-CIO

and

WALT TURNER,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a court may, without violating the guarantees of the First Amendment to the Constitution, enjoin a union and its members from engaging in lawful, peaceful picketing by requiring individual members to sign a certification *prior* to picketing that they have read and "understood" 12 pages of legal discussion concerning the National Labor Relations Act and requiring the union to provide a list identifying by name and home address each of the members of the union, whether or not they engage in picketing, and requiring the union to confer with any members prior to picketing?

2. Whether the court below erred in rejecting a Special Master's Recommendation that a union *not* be found to have engaged in contemptuous conduct where it had "implied" the necessary finding to justify the contempt holding in light of the clear and convincing "standard" in a contempt case.

## LIST OF PARTIES

The parties to the proceedings below and before this Court are:

A. Iron Workers Local 118, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO;

B. Walt Turner; and

C. The National Labor Relations Board.

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## PETITION FOR A WRIT OF CERTIORARI

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Iron Workers Local 118, and Walt Turner respectfully pray that a Writ of Certiorari issue to review the Memorandum Opinion of the United States Court of Appeals of the Ninth Circuit entered in this proceeding on July 26, 1990.

### OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed on July 26, 1990 was not published at the request of the Court. Appendix pp. 1-10, *infra*. The Order of the United States Court

of Appeals for the Ninth Circuit denying the Petition for Rehearing and rejecting the suggestion for rehearing *en banc* was filed September 19, 1990 and at the request of the Court is not published. Appendix p. 31, *infra*. The United States Court of Appeals for the Ninth Circuit Special Master's Findings of Fact and Conclusions of Law dated September 27, 1989 is attached. App. pp. 11-30, *infra*. The U.S. Court of Appeals for the Ninth Circuit Judgment enforcing the Order of the National Labor Relations Board filed September 16, 1987 is attached herein. Appendix pp. 32-37, *infra*.

## JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit was duly filed on July 26, 1990.

A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed. On September 19, 1990 the Petition for Rehearing was denied and the Suggestion for Rehearing En Banc was rejected. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c).

## STATUTES INVOLVED

The relevant statutory provision is:

The National Labor Relations Act, as amended, 29 U.S.C. Section 158(b)(4)(i), (ii)(B), which states in relevant part:

> "It shall be an unfair labor practice for a labor organization or its agents (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) threaten, coerce, or

> restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other purchaser, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title . . ."

## STATEMENT OF THE CASE

On October 29, 1987, the Ninth Circuit issued an injunction against the Respondent. It is the alleged contempt of that order which is the subject of this Petition. (App. 32).[1]

In February of 1988, a labor dispute ensued in connection with the construction of a state prison project in Jamestown, California. Iron Workers Local 118 picketed the project with signs identifying the employer as "Ron Regan Construction Co." The National Labor Relations Board (hereinafter referred to as the "NLRB" or the "Board") sought a contempt citation from the Ninth Circuit alleging that Local 118's picketing constituted contempt of the Court's 1987 Order. Specifically, the Board alleged that the Union violated the Court's Order by violating § 8(b)(4) of the Act by (1) naming an incorrect employer as the "primary" employer on its picket signs, and (2) by picketing the wrong gate at the project.

The Ninth Circuit referred the matter to a federal magistrate to sit as a Special Master and to hold an evidentiary hearing after which she was to issue her recom-

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[1] Hereinafter the Appendix shall be referred to by the abbreviation "App." followed by the relevant page number.

mended findings of fact and conclusions of law. After a full evidentiary hearing, the Special Master issued her Findings of Fact and Conclusions of Law recommending that the Union *not* be found in contempt of the Court's Order (App. 11). Specifically, the Special Master found that the employers on the jobsite had given false and misleading information to the Union concerning both the identity of the "primary" employer and the proper gate to be set aside for "neutral" employers. The Special Master found that the employers had set up a situation which they knew would lead to, and did lead to, improper picketing by the Union. Thus, she found that "[o]n these facts, the undersigned cannot find clear and convincing evidence that an object of Respondents' picketing was secondary. The undersigned recommends that the Board's petition that Respondents be held in contempt of the Court's order be denied." (App. 29-30).

The NLRB filed exceptions to the Special Master's Findings of Fact and Conclusions of Law. The Ninth Circuit specifically noted that the Board did not dispute any of the Special Master's factual findings. (App. 2). Nevertheless, the Ninth Circuit rejected the Special Master's findings with respect to the Union's naming of Regan on the picket signs.[2] The Ninth Circuit found an "implicit" secondary intent on the Union's part and found the Union and its Business Agent, Walt Turner, in contempt of the Court's Order.

The Court issued an Order requiring, *inter alia*, that "at the outset of any future picketing . . . all persons assigned picket line duty [shall] sign a receipt indicating the date on which he or she picketed and that he or she has received, read, *understands*, and will comply with [the Court's Orders]; . . ." (emphasis added) (App. 9).

Additionally, the Order imposed prospective fines in varying amounts, including prospective fines in the

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[2] The Ninth Circuit did not deal with the issue of the Union's picketing at the incorrect gate.

amount of $1,000 per day against various persons, including the individual members of the Union, for any future violations. The Order further prohibited the Union from permitting any members to picket any employer without first conferring with the members to insure that the picketing will be consistent with the Court's Orders and requiring that the Union submit signed acknowledgments to the NLRB that the picketing will be in accordance with the Court's Orders. Finally, the Order requires that the Union identify to the NLRB all of its members by name and home address.

## REASONS FOR GRANTING THE WRIT

### I. THE INJUNCTION IS UNCONSTITUTIONAL IN THAT IT IS VAGUE, OVERBROAD, IMPERMISSIBLY CHILLS FIRST AMENDMENT RIGHTS AND CONSTITUTES A PRIOR RESTRAINT ON SPEECH

The right to peacefully picket during a labor dispute is protected by the First Amendment to the United States Constitution. *Thornhill v. Alabama*, 310 U.S. 88 (1940). "[T]he dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution." *Thornhill*, 310 U.S. at 102 (citations omitted). As this Court has cogently noted, "[p]eaceful picketing is the workingman's means of communication." *Milk Wagon Drivers' Union of Chicago Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

The injunction in this case purports to be connected with picketing which is violative of Section 8(b)(4) of the National Labor Relations Act (hereinafter the "Act") (29 U.S.C. § 158(b)(4)). However, as this Court has recently cautioned, because the requirements of the Act, and especially § 8(b)(4) thereof, can, if not judiciously applied, infringe upon First Amendment rights, the Act must be construed narrowly always in an attempt to avoid a collision with First Amendment

rights. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 577 (1988). The injunction in this case directly collides with First Amendment rights.

Because of the fundamental nature of free speech guaranteed by the First Amendment, government regulation in this area "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). This injunction while designed to prevent unlawful picketing, is overbroad in that it prohibits lawful picketing.

The injunction here poses a requirement that "at the outset of any future picketing . . . all persons assigned picket line duty [shall] sign a receipt indicating the date on which he or she picketed and that he or she has received, read, understands, and will comply with [the Court's orders]; . . ." (App. 9). These receipts must be submitted to the NLRB, thereby notifying the Board before picketing begins (App. 3). The requirement of prior warning to the NLRB will prevent the Union from lawfully communicating with the urgency which labor disputes often require. The element of surprise or instant response is crucial to worker speech. While attempting to prevent lawful pickets, this Injunction completely chills lawful but urgent picketing. The Injunction prohibits lawful picketing and prospectively fines a lawful picketer $1,000 per day if any terms of this Injunction have not been met. By the requirement, that Petitioners read and understand the order, the Injunction prevents any member, representative or agent who cannot either read or understand this order from lawful picketing. The Order requires that Local 118, "[r]efrain from authorizing or permitting any of Local 118's members, representatives or agents to picket unless and until Local 118 has conferred with those members, representatives, or agents and determined that the objects and

manner of the proposed picketing are consistent with this Order and this Court's October 27, 1987 Order."

Even if the Union engages in perfectly lawful, protected picketing activities, the Union and its members must comply with all of these requirements prior to engaging in any picketing activities. The NLRB did not proffer, nor did the Court state, any governmental purpose to be served by this restraint on completely lawful picketing activities which are not only protected by the Act itself but, moreover, are constitutionally protected by the First Amendment.[3]

An injunction which on its face burdens lawful, protected Constitutional rights is overbroad.

Indeed, the overbreadth of the injunction in this case is far greater than that already declared unconstitutional by this Court in a less drastic injunction sought and obtained by the NLRB. In *Communication Workers of America, AFL-CIO v. National Labor Relations Board*, 362 U.S. 479 (1960), the Board entered an order requiring the Union to cease and desist from "in any manner" restraining or coercing employees of the telephone company "or any other employer" in the exercise of rights guaranteed by § 7 of the Act. The Sixth Circuit enforced the order after deleting the words "in any manner." This Court found that the Board's order was overly broad and deleted the words "or any other employer." Quoting *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941), this Court stated:

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[3] Indeed, no legitimate purpose could be proffered for this extraordinary requirement. It must be kept in mind that there was never any allegation that the picketing at issue in this case encompassed violence of any type. Moreover, any employer who may be injured by unlawful picketing in violation of § 8(b)(4) (the party presumably to be protected by this Injunction) is afforded a monetary damage remedy pursuant to § 303 of the Labor Management Relations Act, 29 U.S.C. § 187. Thus, there could be no conceivable governmental purpose to be served by arbitrarily burdening lawful picketing activities.

> "'It would seem . . . clear that the authority conferred on the Board to restrain the practice which it has found . . . to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.'" *Communication Workers of America*, 362 U.S. at 480-81, citing *NLRB v. Express Pub. Co.*, 312 U.S. 426, 433 (1941).

Likewise, in *Cafeteria Employees Union Local 302 v. Angelos*, 320 U.S. 293 (1943), this Court struck down an injunction which prohibited a Union from picketing at or near an employer's place of business, despite a finding that the statements on the picket signs were knowingly untrue. In finding the injunction unconstitutional, this Court stated:

> "'. . . [T]he power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion. Right to free speech in the future cannot be forfeited because of disassociated acts of past violence.' [citation omitted]
>
> "'Still less can be the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occuring in the course of that picketing.'" (320 U.S. at 296).

In addition to placing impermissible burdens on protected speech, the injunction in this case discriminates against classes of Union members. Needless to say, the requirement that each member, *prior* to being able to picket, sign a receipt indicating that he or she "received, read, *understands* and will comply" with the Court's Orders, discriminates against Union members who are either illiterate or foreign speaking or who, for whatever reason, are unable to certify they have read and understand the Court's Orders. Any such members are

forever prohibited from exercising their First Amendment rights to freedom of speech in a labor dispute.[4] In no prior case known to Petitioner's counsel has this Court or any other court made the right to engage in First Amendment freedoms dependent upon one's ability to read and write.

*Lovell v. Griffin*, 434 U.S. 444 at 451 (1938) held:

> "A system of prior restraint to expression comes to this Court bearing a heavy presumption against its constitutional validity."

See also, *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); and *Freidman v. Maryland*, 380 U.S. 51, 57 (1965); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1974). The injunction has restrained the Union and its members from exercise of their right to free speech in advance of a court hearing the content of the speech. The requirements that: 1) members get authorization from the Union prior to picketing; 2) members submit receipts indicating "understanding" of the order; 3) names and addresses of Union members be sent to the NLRB; and 4) the NLRB be notified at the outset of any picketing, are all unconstitutional as a prior restraint on freedom of speech.

While this Court in *Lassiter v. North Hampton County Board of Elections*, 360 U.S. 45 (1959), upheld a literacy test in the context of voting, it did so on the ground that the ability to read and write had a direct relationship to the intelligent exercise of the voting right and, therefore voting classifications based on literacy were neutral. This case is not only distinguishable here

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[4] It must be kept in mind that there is no temporal limit on this Order. The Order does not expire on any given date in the future; there is no mechanism by which the Union can purge itself of contempt and relieve itself of the remedy's strictures. This, of course, shows the overbreadth of this remedy which clearly does not employ the least drastic means to achieve a governmental pinpointed objective. *Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

but actually demonstrates the invidious nature of this Order. There is no direct relation between the exercise of the right to picket and the ability to read and write. Indeed, for the illiterate worker or the worker who lacks communication skills, picketing may be the *only* way in which he can communicate to the public the grievances he has against the employer. A worker should have the unfettered right to express his opinion by means of the picket since, as the Court has recognized, "[p]eaceful picketing is the working man's means of communication". *Milkwagon Drivers' Union of Chicago Local 753 v. Meadowmoor Dairies, Incorporated*, 312 U.S. 281, 293 (1941).

Even if the member is able to read and write, the requirement that the member affirm that he or she "understands" the Orders, and will "comply" with the Orders based upon that understanding, under penalty of substantial financial individual fines if compliance is not forthcoming, has a chilling effect upon the exercise of First Amendment rights. The legal concepts governing § 8(b)(4) of the Act are intricate, to say the least. Complete "understanding" of the law on this subject would rarely be professed by labor lawyers, let alone members of the Union, who are construction workers who may or not be high school graduates, and who certainly have not had any legal training. Moreover, since the NLRB is not governed by principles of *stare decisis*, the law relating to what conduct does or does not violate § 8(b)(4) of the Act can and does change regularly. Members who sign a statement certifying that they "understand" the Orders do so at their peril since the Board can change the state of the law in any given case, which change, under normal Board policy, is applied on a retroactive basis. See, *e.g.*, *John R. Deklewa & Sons*, 282 NLRB No. 184 (1987).

## II. THE ORDER INFRINGES ON UNION MEMBERS' RIGHTS TO FREEDOM OF ASSOCIATION

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court announced in clearest form the principles underlying the right of freedom of association:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. (citations omitted) It is beyond debate that freedom to engage in association . . . is an inseparable aspect to the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. (citations omitted) Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. 449, 460-1.

In *NAACP v. Alabama*, this Court struck down as unconstitutional a state requirement that the NAACP disclose the names and addresses of all of its Alabama members to the state's Attorney General. See also, *Bates v. Little Rock*, 361 U.S. 516 (1960). The principles underlying the *NAACP* case are equally applicable in the labor Union setting. This Court has already so held:

> "That the State has power to regulate labor unions with a view to protecting the public interest is . . . hardly to be doubted. They cannot claim special immunity from regulation. Such regulation, however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

As this Court has held, "the right either of workmen or of unions under these conditions to assemble and discuss

their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others." *Collins*, 323 U.S. at 539.

The requirement here that all of Local 118's members' names and addresses be given to the NLRB is exactly parallel to the disclosure requirement in *NAACP v. Alabama*. The Order requires that Local 118 identify by name and home address all of its members. These names are to be reported regardless of whether these people have ever picketed or ever will picket. The requirement is purely designed to give the NLRB a list of Union members. It serves no compelling governmental purpose since the identification of Union members is unrelated to the picketing at issue in the underlying NLRB charges.

In the context of Union membership, the Court should look to § 7 of the National Labor Relations Act, 29 U.S.C. § 157, which has been hailed as the hallmark of the Act. In § 7, workers are assured of the right to join labor Unions and to not join labor Unions, in accordance with their own desires. Many workers would prefer not to have it made common knowledge, especially if their employers are able to gain such knowledge, that they are indeed members of Unions. This is especially true if an organizing drive is in the process where it is commonplace that known Union adherents are often discharged in order to prevent unionization of a company. The mere possibility that one's membership in a Union could become public knowledge has a definite chilling effect upon one's willingness to join the Union.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), teachers were required to disclose all organizations to which they belonged during the preceding five years. There, like here, there was no protection against disclosure of this information. In upholding the disclosure requirement, the Arkansas Supreme Court held that the "affidavits

*need* not be opened to public inspection . . ." 364 U.S. at 486 n.6 [emphasis in the original], and therefore, no infringement on First Amendment rights was shown. This Court, however, found that this was insufficient protection to justify the possible chilling of First Amendment rights:

> "Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, will simply operate to widen and aggravate the impairment of constitutional liberty." 364 U.S. at 486-87.

This Court noted that the mere *possibility* of disclosure "makes for caution and timidity in their associations" (364 U.S. at 487), and thus struck down the disclosure requirements as an impermissible infringement of First Amendment Freedom of Association rights. See also, *Local 1814, International Longshoremen's Association v. The Waterfront Commission of New York Harbor*, 667 F. 2d 267 (2d Cir., 1981), wherein the Court struck down as unconstitutional a disclosure requirement in the course of an investigation of coercion and fraud which required the disclosure of the names of all Union members who had signed payroll deduction authorization forms.

Certainly in the context of compelled disclosure of membership in a labor Union, there is substantial reason why members would fear disclosure of this information.[5]

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[5] This Court has specifically held that an entity opposing disclosure requirements on the basis of feared harassment will not be held to "unduly strict requirements of proof." See, *Brown v. Socialist Workers (74 Campaign Committee)*, 459 U.S. 87 (1982). There, this Court held that a lack of direct evidence linking the

In the labor Union setting, there is more than sufficient evidence to establish that labor Unions and their members have, throughout our history, been subjected to harassment by both government and employers. For instance, for a major part of our history, labor Unions were considered to be conspiracies, and it was an antitrust violation for a Union to attempt to collectively bargain on behalf of its members. This background was in fact the genesis of the Clayton Act (15 U.S.C. § 17). Well into this century, the favorite tool of employers against labor unions and their members was "a midnight injunction" obtained from federal courts to prevent unions from engaging in protected First Amendment activities. This background was the genesis of the Norris-LaGuardia Act (29 U.S.C. § 101, *et seq.*). Historically, for many decades, "passwords" were necessary to attend Union meetings, and the identity of those who attended was kept secret because of employer retaliation against those who supported Unions. See, *e.g. Wirtz v. Fowler*, 372 F. 2d 315 (5th Cir., 1966), wherein the Fifth Circuit noted that the legislative history of the McClellan Committee, demonstrated that the Committee "was primarily concerned with management hired labor spies and undisclosed middlemen who engaged in espionage and deceptive persuasion." 372 F. 2d at 324. To this day, Union membership lists are confidential and statutorily protected. (See § 481 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 481(c)).

Although some might say that these abuses have been corrected, Unions and their members would point to the sharp anti-union bent of the National Labor Relations Board which has existed during the past decade. See, Jules Bernstein and Laurence E. Gold, "Midlife Crisis:

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disclosure requirements to the feared harassment would not detract from the First Amendment challenge raised, and that the campaign could rely upon evidence of reprisals and threats directed against individuals or organizations holding similar views to support its First Amendment challenge. (459 U.S. at 101 n.20).

The National Labor Relations Board at Fifty", *Dissent*, Spring, 1985, pp. 213-218. As pointed out in the Bernstein and Gold article, NLRB member Dotson went so far as to denegrate collective bargaining and stated that "collective bargaining frequently means labor monopoly, the destruction of individual freedom and the destruction of the marketplace as the mechanism for determining the value of labor."

Certainly a requirement which forces a Union to identify its members by name and home address to a governmental agency which has openly advocated principles contrary to the very notions of unionism will have a chilling effect upon the members' rights to freedom of association. This Court has mandated over and over again that even where the governmental purpose to be achieved is substantial, the means of achieving that purpose must be the least drastic available.

> "In a series of decisions, this Court has held that, even though the governmental purpose be substantial and legitimate, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. at 488. (footnotes omitted).

Even the Ninth Circuit which issued the Order herein has noted that the burden is upon *the government* to justify its need for disclosure when confronted with a First Amendment challenge: "When governmental activity collides with First Amendment rights, the government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicating its subordinating interests." *Versy v. United States*, 466 F. 2d 1059, 1083 (9th Cir., 1972). The Court went on to note that "[w]hen

First Amendment interests are at stake, the government must use a scalpel, not an ax." 466 F. 2d at 1088.

In the instant case, there is no stated justification in the Order for this extraordinary requirement that Local 118's members be identified by name and address to the National Labor Relations Board. Clearly the Ninth Circuit disregarded its own admonition that a "scalpel not an ax" must be used where First Amendment rights are at issue. A more intrusive infringement on First Amendment rights of Freedom of Association than the identification requirement in this case can hardly be imagined.

## III. THE COURT IMPROPERLY DEVIATED FROM THE CLEAR AND CONVINCING EVIDENCE STANDARD BY REJECTING THE SPECIAL MASTER'S FINDINGS AND "IMPLYING" THE NECESSARY FACT TO JUSTIFY A CONTEMPT FINDING

After conducting a full evidentiary hearing, the Special Master determined that Local 118 should *not* be found to have engaged in contemptuous conduct. The Special Master found that by placing Ron Regan's name on the picket signs, the Union technically violated the fourth criterion of *In the matter of Sailors' Union of the Pacific and Moore Dry Dock Co.*, 92 NLRB 547 (1950). However, consistent with the admonitions of this Court and the Ninth Circuit that the *Moore Dry Dock* tests are not to be "mechanically applied",[8] she found that the technical violation "does not in itself warrant the conclusion that the Union had an improper purpose." (App. 24). In refusing to defer to the Special Master's findings, the Ninth Circuit mischaracterized the findings and, indeed, inserted findings which do not

[8] *Electrical Workers v. Labor Board*, 366 U.S. 667, 677 (1961); *Allied Concrete, Inc. v. NLRB*, 607 F.2d 827, 831 (9th Cir. 1979); *Constar, Inc. v. Plumbers Local 447*, 748 F.2d 520, 522 (9th Cir. 1984).

appear in the Special Master's Report. It chose, in fact to "mechanically apply" the *Moore Dry Dock* standards.

The Ninth Circuit's decision is based upon one critical finding attributed by the Panel to the Special Master. The Ninth Circuit stated:

> "Moreover, the Special Master found that Turner and Local 118's object was to put pressure on Regan, a neutral employer, and rejected union's claims to the contrary as not credible." (App. 5).

The Court of Appeal went on to state:

> "As the Special Master found, the only purpose in picketing Regan was to pressure it to cease using a non-union company (Walker) to which Regan had subcontracted the labor for steel erection work at the jobsite." (App. 6).

With all due respect ot the Ninth Circuit, the Special Master never made a finding that it was Respondents' *purpose*, let alone their "only purpose", in placing Regan's name on the picket signs to pressure Regan to cease using Walker's services. Nowhere does that finding appear in the Special Master's Findings. The Special Master did reject as "not credible" the Union's assertion that it had a primary labor dispute with Regan *concerning the apprenticeship issue*. (App. 23). That is the only contention which she rejected as being not credible.

What the Special Master actually found was that the Board had failed to prove by "clear and convincing evidence" that the Union harbored an improper purpose in naming Regan on the picket signs because F&H Construction, the General Contractor on the jobsite, "announced Regan as the primary employer on its [gate] signs and in its telegrams" to the Union. (App. 24).

There is no dispute over the facts relating to F&H's misleading statements to the Union concerning who was

the primary employer.[7] As the evidence showed, and as the Special Master found, F&H informed the Union that Regan was the subcontractor on the job. (App. 24;). The owner of F&H corroborated that he never informed anyone at the Union that Walker was performing the work rather than Regan. (Tr. 1:56). He acknowledged that Regan was listed as the subcontractor with the State of California and that he never notified the State of California that Walker was going to do the work. (Tr. 1:40).

F&H announced to the Union in telegrams that Regan was the employer. (App. 15). There was no mention of Walker anywhere in the telegrams sent to the Union. Indeed, Clark Fregien of F&H Construction Company, the person who sent the telegrams, admitted that the telegrams did not make any sense (Tr. 150-151). When the reserve gate system was set up by F&H prior to any picketing, *only Ron Regan's* name appeared on the signs. Again, there was no mention of Walker on the signs (App. 14).

In addition to the affirmative statements to the Union that Regan was the employer, the Union was given the run around when it attempted to obtain information concerning this situation. When the Union asked F&H when they would be hiring apprentices, F&H indicated that they would have to talk to Ron Regan (Tr. 3:409), and when they called Ron Regan they were told to call Ron Walker (Tr. 3:410), and when they called Ron Walker they were told to call Ron Regan (Tr. 2:327). This testimony was unrebutted.

Moreover, it was conceded that Walker's certified payroll reports had to go through Regan. (Tr. 2:207; 1:43).

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[7] The employers not only supplied the Union with false information as to the identity of the primary employer but, in addition, lied to the Union about the operation of the reserve gate system. The Special Master found that the system set up "could have been foreseen to lead, and did lead, to circumvention of the system by the suppliers, and the neutral employers knew it." (App. 29).

It was Regan, not Walker, who prepared a daily report which reflected the man hours on the job. (Tr. 1:122). All of F&H's dealings would go through Regan, not Walker (Tr. 1:120). F&H gave instructions to Regan, not to Walker, that the employees would have to work overtime or on Saturdays (Tr. 121). Indeed, the contract between Regan and Walker was not even signed until February 25, 1988, the second to the last day of picketing (Tr. 2:187).

That is the testimony from which the Special Master drew the inference that the Union's technical violation of the fourth *Moore Dry Dock* criterion did *not* prove that the Union harbored an improper motive when it named Regan on the picket signs. By refusing to defer to the inference drawn by the Special Master, the panel deviated from the accepted review standard. Where the motive for the Respondent's action is at issue, and the Master has drawn inferences supported by credited evidence, those inferences are "nearly conclusive". *Phelan v. Middle States Oil Corp.*, 220 F. 2d 593, 597-98 (2d Cir., 1955), *cert. den. sub. nom., Cohen v. Glass*, 349 U.S. 929. See, *NLRB v. Western Clinical Laboratory, Inc.*, 571 F. 2d 457-59 (9th Cir., 1978). "[N]othing is more difficult than to disentangle the motives of another's conduct . . . [and] for that very reason those parts of the evidence which are lost in print become especially pregnant and [the reviewing court] which has no access to them should [hesitate] to assume that the [trier of fact] was not right to act upon them." *NLRB v. Universal Camera Corp.*, 190 F. 2d 429, 431 (2d Cir., 1951) *on remand from* 340 U.S. 474.

Not only did the panel not defer to the Special Master's findings concerning motive, and not only did the Panel include a critical finding as to the Union's "purpose" which the Special Master did not make but, in addition, the Court "implied" the necessary nexus to establish contemptuous conduct. In order to meet its burden of proof, the Board's evidence of an improper

motive had to be "supported by clear and convincing evidence". *NLRB v. Sequoia District Council of Carpenters, AFL-CIO*, 568 F. 2d 628, 631 (9th Cir., 1977); see also, *Schauffler v. Local 1291, International Longshoremen's Union*, 292 F. 2d 182, 190 (3d Cir., 1961) ("Whatever the language used it must be taken as settled that the petitioner in a civil contempt proceeding must overcome a heavy burden of proof.") Moreover, the Ninth Circuit has recently held that the Court must begin with the "presumption" that the Respondents acted lawfully:

> "[W]e will not lightly find that a federal law has been violated. . . .
>
> ". . .
>
> "[W]e find that there is still considerable merit to the general legal principle that people should be presumed to be acting lawfully until proven otherwise. Certainly, we are aware of no legal principle that would warrant an opposite presumption in the absence of some indication that the conduct in question was in fact unlawful." *NLRB v. Iron Workers Local 433*, 850 F. 2d 551, 557 (9th Cir., 1988).

At pp. 5-6 of the Ninth Circuit Decision, (App. 5) that court stated that "[*i*]*mplicit* in these findings is the fact that Turner, and hence Local 118, knew the picket signs identified Regan, a neutral employer." (Emphasis added).

If a contempt finding requires proof of the contemptuous conduct "by clear and convincing evidence," and if the Respondents are "presumed" to be acting lawfully until *proven* otherwise, how then can a contempt finding be based upon a critical nexus that the Union and Turner *knew* that Regan was a "neutral employer" which nexus is *implied* by the Court, and which is not a finding made by the Special Master? By *implying* this critical fact, the Court of Appeal deviated from the "clear and convincing" evidentiary standard which must be applied in a contempt action and departed from the

appropriate review standard which requires that deference be paid to the Special Master's findings concerning the alleged contemnors' motive.

The Court here clearly has reversed the burden of proof in this contempt case, and has deviated from the deferential standard required on review of the Special Master's findings. This reversal of the burden of proof has lead to this absolutely astounding Order which unconstitutionally burdens the First Amendment rights of this Union and its members solely because the Union responded in a wholly anticipated manner to a situation created by the employers when they knowingly supplied false information to the Union.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December, 1990

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# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 87-7222

NLRB Nos. 32-CC-1101
32-CC-1107

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

IRONWORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRONWORKERS, AFL-CIO,
*Respondent,*

and

WALT TURNER,
*Additional Respondent in Contempt.*

---

On Petition for Adjudication of Civil Contempt
and for Other Relief

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Argued and submitted April 20, 1990
San Francisco, California

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MEMORANDUM *

[Filed Jul. 26, 1990]

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Before: Beezer and Kozinski, Circuit Judges; and Bonner, District Judge **

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Petitioner, National Labor Relations Board ("NLRB"), objects to the Special Master's report concluding that respondents, Ironworkers Local 118, International Association of Bridge, Structural, and Ornamental Ironworkers, AFL-CIO ("Local 118") and its business agent, Walt Turner ("Turner"), were not in contempt of our October 29, 1987 Order prohibiting Local 118 and its agents from engaging in secondary boycott activities. For the reasons explained below, we conclude that Local 118 and Turner violated our Order and accordingly hold them in contempt.

Background

NLRB does not contest the Special Master's factual findings. The special master found in pertinent part as follows:

In July 1986, Local 118 picketed a California state prison construction project in Jamestown, California. On October 29, 1987, we enforced an NLRB order prohibiting Local 118, its officers, and its agents from

> picketing at or near entrances to construction jobsites established and reserved for the use of neutral persons, their personnel, visitors, and suppliers, or

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert C. Bonner, United States District Judge for the Central District of California, sitting by designation.

> in any other manner, or by any other means, inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any articles, materials, or commodities, or to refuse to perform any other services, or coerce or restrain . . . any . . . person engged [*sic*] in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require . . . any . . . person, to cease doing business with . . . any other person.

F&H Construction, Inc. ("F&H") contracted with the State of California to build the prison facility. F&H subcontracted with Ron Regan Construction Company ("Regan") whereby Regan agreed to supply and erect six pre-fabricated metal buildings.

Regan subcontracted that steel erection work to Walker Construction Company ("Walker"). Neither Regan nor Walker had a collective bargaining agreement with Local 118.

Shortly after we issued our October 29, 1987 Order, Turner told Regan that there would be labor problems because Walker was non-union. Local 118 knew that its dispute was with Walker, not with Regan. On or about February 5, 1988, F&H set up a reserved, dual-gate system outside the prison walls.[1] Regan's name was in-

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[1] In a reserved gate system, a "primary" or "reserved" gate is set up for the use of the primary employers' employees and suppliers; the "secondary" or "neutral" gate is used by everyone else connected with the project. *Constar, Inc. v. Plumbers Local 447*, 568 F. Supp. 1440, 1448 (E.D. Cal. 1983), *aff'd*, 748 F.2d 520 (9th Cir. 1984). The primary employer is the employer with whom the union has the dispute. A secondary employer is an employer with whom the union does not have a dispute. 2 C.J. Morris, *The Developing Labor Law* 1129 (2d ed. 1983).

cluded on the sign identifying the reserve gate, Gate No. 1, and the telegrams to Local 118 also stated that Regan would be using Gate No. 1.

Turner sought and obtained sanction from the Building Trades Council to picket Walker because Walker did not have an agreement with Union and was not hiring apprentices. On February 5, 1988, Local 118 began picketing the neutral gate, Gate No. 2. The picket signs read, "Ron Regan Unfair to Ironworkers."

No picketing occurred between February 6-22. On February 23, 24, 25, and 26, Local 118 picketed Gate No. 2 with signs that read, "Ron Regan Unfair to Ironworkers."

Jurisdiction

We had jurisdiction under 29 U.S.C. § 160(e) to issue our October 29, 1987 Order. We have jurisdiction in this contempt proceeding under our inherent authority to coerce compliance with our orders. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 194-95 (1949); *Vuitton Et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 779 (9th Cir. 1981). The Special Master's report finally disposes of all the issues between the parties, and NLRB's objections to her report were timely filed.

Scope of review

A Special Master's findings of fact will not be disturbed unless clearly erroneous. Fed. R. Civ. P. 53(e)(2); *Swoboda v. Pala Mining, Inc.*, 844 F.2d 654, 656 (9th Cir. 1988). Findings are not clearly erroneous unless the "'reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (citation omitted); *United States ex rel Leno v. Summit Construction Co.*, 892 F.2d 788, 791 (9th Cir. 1989).

A Special Master's conclusions of law receive "no deference," and are subject to *de novo* review. *Swoboda*, 844 F.2d at 656; *NLRB v. FMG Industries*, 820 F.2d 289, 291 (9th Cir. 1987).

The party asserting contempt must prove contempt by clear and convincing evidence. *Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989); *NLRB v. Sequoia District Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977). In civil contempt proceedings the contempt need not be willful. *McComb*, 336 U.S. at 191; *United States v. Laurins*, 857 F.2d 529, 534 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 3215 (1989). Nor must the contempt be willful in order to award fees and expenses. *Perry v. O'Donnell*, 759 F.2d 702, 704 (9th Cir. 1985).

Analysis

The Special Master specifically found: that Local 118's dispute was with Walker, M.R. at 4, and that Local 118 and Turner knew of our October 1987 Order, M.R. at 2;[2] that on February 5, and again on February 23-26, 1988, Local 118 picketed the jobsite with picket signs identifying Regan as the company with which Local 118 had a labor dispute, M.R. at 4, 6-7; and that Turner was in charge of the daily picketing, M.R. at 5. Implicit in these findings is the fact that Turner, and hence Local 118, knew the picket signs identified Regan, a neutral employer. Moreover, the Special Master found that Turner and Local 118's object was to put pressure on Regan, a neutral employer, and rejected Union's claims to the contrary as not credible. M.R. at 5-6, 16-17.

The central issue—*viz.*, whether Local 118 and Turner violated our Order by pressuring a neutral employer—was, in the proceeding before the Special Master, overshadowed by the questions whether Local 118 and Turner

[2] The Special Master rejected as "not credible" Union's factual assertions in support of its claim that its dispute was with Regan. M.R. at 5-6.

violated the Order by picketing a properly established neutral gate and whether certain statements by Turner and a picketer were threats of action against neutral employers. We need not reach those issues, because if the picketing was directed at a neutral employer for the purpose of pressuring that employer, the picketing violated our Order whether or not separate primary and neutral gates existed or were properly established or maintained.

As the Special Master found, the only purpose in picketing Regan was to pressure it to cease using a nonunion company (Walker) to which Regan had subcontracted the labor for steel erection work at the jobsite. The Special Master made no conclusion regarding whether this specific conduct violated our Order. Rather, the Special Master concluded that because the general contractor, F&H, had named Regan in its gate sign for the primary gate and in the telegrams to Local 118, NLRB could not complain of picketing directed at Regan. M.R. at 17. The Special Master's findings make no suggestion that Local 118 was confused on this point. Rather, the Special Master specifically found that Local 118 knew its dispute was with Walker, and the evidence supports that finding. Indeed, Turner sought from the Building Trades Council authority to picket *Walker*, not Regan, and the Special Master found "not credible" Local 118's testimony that it thought its dispute was with Regan.

Given the fact that Local 118 knew Regan was a neutral employer before and during its picketing, there is no factual or legal support for the Special Master's conclusion that NLRB is estopped from asserting that Local 118's conduct violated our Order. Her conclusion in this regard is unsupported by law or logic, and we reject it.[3]

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[3] Local 118 and Turner cite *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027 (D.C. Cir. 1985), for the proposition that a union has no duty to determine whether the employer that it is picketing is neutral. That case, however, is inapposite: the Special

For these reasons, we conclude that Local 118 and Turner violated our Order, and we hold them in contempt.

Remedies

The Special Master did not consider proposed remedies. However, proposed remedies are purely questions of law, and we can resolve them. *E.g., Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). The following remedies are appropriate, and we, therefore, order Local 118, its officers, agents, employees, and representatives, including Turner, to: [4]

1. Fully comply with and obey our October 29, 1987 Order and the provisions of the NLRB's order thereby enforced, and not in any way, by action or inaction, engage in, induce, or encourage any violation of those orders.

2. Refrain from inducing or encouraging, by picketing or any other acts or conduct, F&H, Regan, or any other individual employed by any person engaged in commerce, or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to refuse to perform any services, or sanction, support, or promote any such conduct, where an object thereof is to force or require, directly or indirectly, those persons to cease doing business with Walker or with any other person.

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Master specifically found that Local 118 and Turner knew that the dispute was with Walker, not with Regan.

[4] We have imposed most of these remedies before. *E.g., Sequoia District Council of Carpenters*, 568 F.2d at 623; *NLRB v. Service Employees Local 77*, 123 LRRM (BNA) 3213, 3214 (9th Cir. November 25, 1986). In fact, we required Local 118 and its agents and officers to cease and desist and to post and mail notices in *this* case. *See* October 1987 Order ¶ 2(a), (b).

3. Immediately duplicate at their own expense and post in conspicuous places where notices to employees and member are customarily posted, for a period of sixty consecutive days, copies of this Order and of an appropriate notice ("Notice") in the form prescribed by the NLRB, signed by Turner and by appropriate officers on behalf of NLRB, stating that they have been adjudged in civil contempt of this Court for violating and disobeying this Court's October 29, 1987 Order, and that they will undertake the action in purgation directed by this Court. Further, Local 118 and Turner must maintain such copies and notices in clearly legible condition throughout the sixty-day posting period and ensure that they are not altered, defaced, or covered by any other material.

4. Sign, duplicate, and mail at their own expense, copies of this Order and the Notice to all members of Local 118, and submit a list of those members, officers, agents, and representatives, and their addresses, to the NLRB Regional Director, together with proof of mailing.

5. Have the Notice read by an appropriate officer of Local 118 at the next regularly scheduled meeting of its membership following the entry of this Order. Respondents shall give the Director of NLRB's Thirty-second region at least two weeks' written notice of such meeting, and the Regional Director may permit an NLRB agent to attend that meeting.

6. Publish said notice, in a format approved by NLRB's Regional Director, in the next issue of Local 118's newsletter.

7. Turner shall signify in writing and under oath that he has been furnished a copy of this Order and of this Court's October 27, 1987 Order; that he understands those Orders and shall conduct himself in all respects consistently with them; and will not, by action or inaction, commit, engage in, induce, encourage, permit, or

condone any violation or violations of these Orders. Turner shall furnish copies of that acknowledgement with NLRB's Regional Director.

8. Refrain from authorizing or permitting any of Local 118's members, representatives, or agents to picket unless and until Local 118 has conferred with those members, representatives, or agents and determined that the objects and manner of the proposed picketing are consistent this Order and this Court's October 27, 1987 Order.

9. At the outset of any future picketing by Local 118's members, representatives, or agents, Local 118 and Turner shall give each picket a copy of this Order and this Court's October 27, 1987 Order, together with written instructions consistent with the terms of those Orders; and will require all persons assigned to picket line duty to sign a receipt indicating the date on which he or she picketed and that he or she has received, read, understands, and will comply with those Orders; and will submit such acknowledgements to NLRB's Regional Director.

10. File a sworn statement with the Clerk of this Court, and a copy with the NLRB's Regional Director showing that steps have been taken to comply with this Court's directives. Such statements shall be filed fifteen days after the entry of the adjudication of contempt and again at the expiration of the sixty-day posting period.

The NLRB will be allowed $5,000 for attorneys' fees in connection with initiating, preparing, and presenting the contempt proceeding. Local 118 and Turner are jointly and severally liable for payment. Said amount shall be paid within thirty days of the filing of this Order.[5]

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[5] We have previously awarded attorneys' fees and costs against a union held in contempt. *E.g., Sequoia District Council of Carpenters*, 568 F.2d at 636. Moreover, the contempt need not be willful

In order to ensure that Local 118 and Turner comply with the terms of this Order, we impose a prospective non-compliance fine of $10,000 against Local 118 for each and every future violation of this or our October 27, 1987 Order; and we impose a further prospective fine of $1,000 per day for each day we conclude the violations have occurred; and we impose a prospective fine of $1,000 per violation against Turner and each officer, member, picket, agent, representative or other person who, in active concert and participation with Local 118 or Turner, violates the terms of this Order or our October 27, 1987 Order with knowledge of that Order.[6]

We enter such prospective fines fully cognizant of the Fifth Circuit's observation that "[t]he imposition of prospective fines is an extraordinary remedy to be imposed only where violations have been flagrant and lesser remedies appear to fail." *NLRB v. Trailways, Inc.*, 729 F.2d 1013, 1023 (5th Cir. 1984). That observation is consistent with the "doctrine that a court must exercise '[t]he least possible power adequate to the end proposed.'" *Shillitani v. United States*, 384 U.S. 364, 371 (1966) (citation omitted). In the case before us, the Special Master found that both Union and Turner knew the dispute was with Walker; accordingly, their violation was "flagrant." Moreover, leser remedies have not been effective.

Conclusion

For the foregoing reasons, we adjudge Local 118 and Turner in contempt of our October 27, 1987 Order, and impose the remedies described above.

IT IS SO ORDERED.

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to award attorneys' fees to NLRB. *Perry v. O'Donnell*, 759 F.2d 702, 705 (9th Cir. 1985) (citation omitted).

[6] Prospective fines have been imposed in the labor contempt context. *See Sequoia District Council of Carpenters*, 568 F.2d at 636; *Service Employees Local 77*, 123 LRRM (BNA) at 3215.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 87-7222

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

IRONWORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO,

and

WALT TURNER,
*Respondents.*

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# SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

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## STATEMENT OF THE CASE

In July of 1986, Ironworkers Local 118, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO ("Union") picketed a state prison construction project located near Jamestown, California. An Administrative Law Judge found that the Union had engaged in unlawful secondary activity, and on April 21, 1987, the National Labor Relations Board ("Board") affirmed that finding. The Board's decision prohibited the Union from engaging in secondary boycott activities in violation of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, 29 U.S.C. Section 158(b)(4)

(i) and (ii)(B). In an October 29, 1987 order, the Ninth Circuit Court of Appeals enforced the Board's decision. The Board now petitions the Court of Appeals to find the Union and Walt Turner, the Union's Business Agent, in contempt of the Court's order. The matter was referred to the undersigned to conduct an evidentiary hearing and to make proposed Findings of Fact and Conclusions of Law.

The Board contends that the Union violated the Court's order by again engaging in secondary boycott activity, picketing the prison project on February 5, 23, 24, 25 and 26, 1988, with an object of enmeshing F&H Construction, Inc. ("F&H") and Ron Regan Construction Company ("Regan"), neutral contractors, in the Union's labor dispute with Ron Walker Construction ("Walker"), a non-union employer.

## FINDINGS OF FACT

Respondents Union and Walt Turner knew of the judgment and order of the Court of Appeals prohibiting the Union from engaging in secondary boycott activity.

On October 6, 1987, F&H entered into a contract with the State of California to build support facilities at the Jamestown prison, the same prison involved in the original case which gave rise to the Court order the Union is now accused of violating. On October 21, 1987, F&H, the general contractor on the site, entered into a subcontracting agreement with Regan, whereby Regan agreed to supply and erect six pre-fabricated metal buildings. Regan subcontracted the erection work on the buildings to Walker. Neither Regan nor Walker has a collective bargaining agreement with the Union.

Each of these three companies (F&H, Regan and Walker) were separately owned, managed and directed and had no connection with each other aside from a contractual relationship.

During the relevant time period herein, F&H, Regan and Walker were all employers engaged in commerce or in industries affecting commerce.

Shortly before initial work on the project was scheduled to begin in November 1987, a pre-job conference was held between F&H and the business agents of the unions representing various trades scheduled to work on the project. Present at the meeting, among others, were F&H prison project superintendent Warren Snodgrass, F&H project engineer Eugene Hayes, and Local 118 Business Agent Walter Turner. In response to inquiries by Turner concerning who would be performing the erection of the metal buildings, Snodgrass replied that Regan was F&H's subcontractor and that Regan was negotiating with union contractors to do the actual erection work.

In early December 1987, Turner telephoned Regan and spoke to Regan's vice president, Gary Todd. Todd told Turner that he intended to subcontract the erector work to PB Erectors, a signatory to Local 118's collective bargaining agreement.

PB Erectors was to commence on or about February 1, 1988. On or about January 29, 1988, PB Erectors informed Todd that it would not perform the erection work. Regan eventually entered into a contract with Walker, a non-union erector.

Around the same time, Todd spoke to Turner about the change in subcontractors, and Turner told Todd that he knew of other union subcontractors who were interested in bidding. Todd explained that there was no time to get bid proposals from them. Turner replied that there would be a problem on the job because Walker was non-union, and that he would have to check with the Union's main office in Sacramento about what to do.

Todd told Euguene Hays, the F&H pirson project engineer, who notified Carl Fregien, F&H Secretary-Treasurer, that Turner said there might be some labor

problems. F&H decided to set up a reserved gate system, and had gate signs printed. The signs stated that Gate No. 1 was for the use of Ron Regan Construction, Inc., their employees, suppliers and customers, and Gate No. 2 was for all other persons. The signs did not mention Walker, nor its suppliers. The signs were improper; the primary gate should have been designated for use by Walker and its employees, suppliers and customers, not for Regan. The Union's dispute was with Walker because he used non-union employees, not with Regan.

On February 1, 1988, the gates were both established inside the main entrance to the prison property. At the time the gates were established, F&H sent a telegram to the Union's office notifying the Union that Regan employees were to use Gate No. 1 and all others were to use Gate No. 2. No mention was made in the telegram of Walker or of which gate the Regan suppliers would use.

From approximately 6:30 A.M. until noon on February 3, 1988, four to six people picketed at the main entrance to the prison property. The picketing was repeated on February 4. These two days of picketing are not in issue.

The picketing was authorized by the Union's Business Manager Max Sturgis; Turner was in charge of daily picketing. Sturgis instructed Turner to put Regan's name on the picket signs, based on the fact that his name appeared on the gate signs. The picket signs at all times read, "Ron Regan Unfair to Ironworkers," and did not include Ron Walker's name.

Turner had requested and received sanction from the Building Trades Council to picket Walker because he did not have an agreement with the Union and was not hiring apprentices. The Union's claim that it had a dispute with Regan because Regan did not insure that Walker had applied to the Joint Apprenticeship and Training Committee ("JATC") to arrange for apprentices to work on the state-funded project is not credible. California state law

requires all contractors hired for state-funded projects to insure that their subcontractors apply for certification to hire apprentices. The Union could have filed a complaint with the Joint Apprenticeship and Training Committee ("JATC"), but it did not. The Union never informed Regan of its complaint, nor did the Union picket signs reflect the dispute.

In fact, Todd, a Regan employee, asked Walker to apply for certification to hire apprentices. Walker attempted to apply for certification, but did an inadequate job; he mailed the application to the wrong office and never again inquired about the application.

Sometime on February 4, 1988, the State Director of Jamestown prison informed Hayes that picketing on state property was illegal. By 3:30 or 4:00 that afternoon the gate signs were removed from inside the prison grounds and placed outside on the main road. The Gate No. 2 sign was placed at the main entrance to the prison. The Gate No. 1 sign was relocated about one quarter mile southwest of the main entrance into the prison site by a gate that enclosed a road through a pasture. Gate No. 1 could not be seen from Gate No. 2 and vice versa. The dirt road through Gate No. 1 was narrow, rough, and lined by large oak trees. There was one sharp turn in the road. It was not suitable for trucks with semi-trailers.

F&H sent a telegram to the Union informing it of the change in gates. It was delivered by telephone at 9:44 A.M. on February 5. The telegram stated in part as follows:

> ". . . This jobsite has two entrances. Gate No. 1 is for Ronald Reagan (sic) Construction Company, Inc. Gate No. 2 is for all others, their employees and supplies (sic). . . ."

17. On February 5 at 6:30 A.M. the Union began picketing Gate No. 2, the neutral gate located at the main entrance to the prison. At approximately 7:00 A.M.

Fregien visited the prison site. He told Cecil Atkinson, a Union picketer, that he was picketing the wrong gate and asked Atkinson to call Turner. About one hour later, Fregien returned and Atkinson told him that he had called Turner, that they didn't care, that they were going to picket there anyway and that they were going to shut F&H down.

Fregien then telephoned Turner and told him that Atkinson had said that he was going to picket the wrong gate. Fregien told Turner that that was illegal, that the gates were established and they were good gates. Turner said he didn't care and that he was "going to shut that job down." (While the Board elicited testimony that Turner did not disavow Atkinson's statements, Fregien did not state clearly what statements of Atkinson's he quoted to Turner.) Turner asked Fregien if Atkinson had given him a slip of paper directing him to call the Union's attorney for information. Upon hearing that he had not, Turner told Fregien to call the attorney and hung up. Turner did not recall this conversation. The picketing continued at Gate No. 2. No pickets were at Gate No. 1, the Regan gate.

No picketing occurred after February 5 until February 23, 1988. On February 23, 24, 25 and 26 the picketing resumed at Gate No. 2, the main gate. The Union did not picket Gate No. 1 except for one hour on February 24.

Sometime during the morning of February 23, the old gate signs were replaced with new gate signs that read as follows:

> Reserved Gate No. 1.
> This Gate is reserved for the Exclusive Use of
> Ron Regan Construction, Inc.
> Ron Walker Construction
>
> Their Employees, Suppliers and Subcontractors.
> All Others Must Entrance [sic] Located
> Off O'Byrnes Ferry Road

The new Gate No. 2 sign read:

> Reserved Gate No. 2
> This Gate is reserved for the Exclusive Use of
> *All Persons Except*
> Ronald Regan Construction
> Ron Walker Construction
>
> Their Employees, Suppliers and Customers
> Must Use Entrance Located on O'Byrnes Ferry Road

Shortly after 11:00 A.M., F&H sent a mailgram to the Union informing it that the reserved gates had been re-established. This mailgram identified Gate No. 1 as reserved for Regan, Walker, and their employees, subcontractors and suppliers, and Gate No. 2 for all others. A letter containing the same information was hand-delivered to the Union office in Stockton at 1:00 P.M. on February 23.

In addition to the two roads with marked gates, there was a third road that led into the prison property, which was called the George Reed road. From the main road, O'Byrnes Ferry road, it was not apparent that the George Reed road led into the prison facility. While Fregien did not know of the George Reed road or of use of it, F&H Project Engineer Hayes saw a delivery of Walker's supplies made by that road, and F&H Project Supervisor Snodgrass also knew that deliveries for Walker were made by that road. Will Reed, the project supervisor employed by Regan, told Leotice Wood, Walker's foreman, that the semi-trucks would use the George Reed road. Reed showed Wood where the George Reed road was located.

Regan and Walker employees usually used Gate No. 1 to enter and exit the prison project. On several occasions, however, these employees used the George Reed road. On one occasion, when the Gate No. 1 road was made impassable by mud, Walker's foreman drove a forklift out by way of the George Reed Road. Turner's testimony that Walker employees used Gate No. 2 is not credible.

Nate's Trucking delivered two shipments of prefabricated metal buildings to the prison project in February. Its owner, Nathan Inman, testified that on February 9 he personally made a delivery through Gate No. 2, the main gate, even though Regan had instructed him not to use the main gate. An unidentified person at the Regan site showed him two roads by which he could exit the project: the Gate No. 1 road and the George Reed road. After examining both roads in a pick-up truck, Inman exited via the George Reed road because the Gate No. 1 road was too narrow. Inman instructed his driver, Mr. Moore, to use the George Reed road to make the next delivery, which was done on February 19.

## CONCLUSIONS OF LAW

A. *Jurisdiction.*

During the relevant time period, F&H, Regan and Walker were all employers engaged in commerce or industries affecting commerce. This Court's jurisdiction to enforce its prior order is not contested.

B. *The Contempt Standard.*

To meet its burden of proof in this proceeding, the Board must prove by clear and convincing evidence that the Union and Turner violated a Court order. *NLRB v. Sequoia District Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977). The Board need not prove that Respondents acted wilfully. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). The Court order here was valid, in full force and effect, and Respondents had knowledge of it.

C. *The Law Governing Secondary Boycott Activity.*

Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. Section 152(b)(4)(B) ("the Act") makes "[t]hreats, picketing, and other economic pressure di-

rected at a neutral employer . . . illegal secondary activity when . . . an object is 'forcing or requiring any person * * * to cease doing business with any other person.' " *NLRB v. Local 85, International Brotherhood of Teamsters, etc.*, 454 F.2d 875, 878 (9th Cir. 1972). The term "cease doing business" under the Act and the judgment "must be construed broadly." *International Brotherhood of Electrical Workers, Local 134*, 179 N.L.R.B. 202, 205 (1969), *enf'd* 433 F.2d 302 (7th Cir. 1970), *cert. denied* 402 U.S. 906 (1971). Unions will not normally admit that their object in picketing is to bring pressure to bear on secondary employers. *See, Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Accordingly, the trier of fact "is free to draw inferences from all the circumstances, and need not accept self-serving declarations of intent, even if they are uncontradicted." *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978).

The essential question in any case involving secondary boycotting is to determine the object of the union's activities. *International Association of Ironworkers, Local 433 v. NLRB*, 598 F.2d 1154, 1158 (9th Cir. 1979). The inquiry is whether an object of the picketing is to force a neutral employer to cease doing business with a primary employer. *Constar, Inc. v. Plumbers Local 447*, 568 F. Supp. 1440, 1449 (E.D. Cal. 1983), *aff'd* 748 F.2d 520 (9th Cir. 1984).

In *In the Matter of Sailors Union of the Pacific and Moore Dry Dock Co.*, 92 N.L.R.B. 547, 549 (1950) the Board set forth criteria to be applied when picketing occurs at a site used by more than one employer, to distinguish between lawful picketing directed solely at the primary employer, *i.e.*, the employer with whom the union has a dispute, and unlawful secondary picketing which at least in part is intended to appeal to neutrals. Picketing is presumptively lawful if it meets these criteria, as summarized by the Supreme Court:

> (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

*Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667 (1961). The *Moore Dry Dock* rules are an evidentiary tool to assist the trier of fact in ascertaining intent. *Constar, Inc. v. Plumber Local 447*, 568 F. Supp. at 1447. A court may infer from other evidence that the union had an improper purpose despite compliance with the *Moore Dry Dock* criteria, or that its picketing had an proper purpose despite a violation of one or more of the *Moore Dry Dock* criteria. Id.—at 1445.

When more than one employer occupy the same site, a reserved gate system may be set up; this entails creating one entry gate for neutral employees and suppliers and a second gate for the employees and supplies of the primary employer. The reserved gate system should put the union on notice regarding the area where it can effectively restrict its appeal to the primary employee and suppliers without enmeshing neutrals in its dispute. *Allied Concrete, Inc. v. NLRB* 607 F.2d 827, 831 (9th Cir. 1979).

Once the reserved gate system is created, the neutral employer "must, in some fashion, give notice to the union of the existence of the reserved gate system." *Constar, Inc. v. Plumbers Local*, 568 F. Supp. at 1448-1449, citing *International Assn of Ironworkers, Local 433 v. NLRB*, 598 F.2d at 1158. The signs on the gate must clearly direct employees and suppliers to the proper gate.

The employer has a duty to "provide the union with truthful information, or the employer may not rely on

the reserved gate system." *Constar, Inc. v. Plumbers Local 447*, 568 F. Supp. at 1449. The gates cannot be so located as to impair the effectiveness of a union's lawful picketing to convey its message to the public, in the case of area wage standards picketing, or to the employees, suppliers and visitors of the primary employer. *Local Union No. 501, International Brotherhood of Electrical Workers v. NLRB*, 756 F.2d 888, 895-896 (D.C. Cir. 1985).

On the other hand, the union has "a duty to picket with restraint, to minimize its impact on neutral employers and employees." *Local Union No. 76 of the International Brotherhood of Electrical Workers v. NLRB*, 742 F.2d 498, 502, (9th Cir. 1984). The union must conduct its picketing "in a manner least likely to encourage secondary effects." *Allied Concrete v. NLRB*, 607 F.2d 827, 830 (9th Cir. 1979), citing *Ramey Constr. Co. v. Local 544, Painters*, 472 F.2d 127, 1131 (5th Cir. 1973). The union has a duty to take the necessary precautions, including making sufficient investigations, to ensure that the neutrals are protected. *See, Retail Fruit & Vegetable Clerks Union, Local 1017 and Retail Grocery Clerks Union, etc. and Crystal Palace Market*, 116 N.L.R.B. 856, 858-859 (1956), *enf'd* 249 F.2d 591 (9th Cir. 1957), cited with approval in *Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. 667, 678-679 (1961).

When the reserved gate system breaks down because the neutral gate has been "polluted," *i.e.*, used by the primary employer, the union may disregard the system and picket the neutral gate until the gate is reestablished. *Constar, Inc. v. Plumbers Local 447*, 568 F. Supp. at 1448-9. Thus, "where the union cannot know that the 'primary' employees and the primary employer's suppliers will only utilize the reserved gate, it is free to picket wherever those proper objects of its measures can

'reasonably' be believed to be found, including the 'neutral gate.'" *Id.* at 1448.

Where the primary employer has taken reasonable precautions to establish and maintain a neutral gate, however, its integrity is not diminished by a showing of isolated or *de minimis* instances of use of the gate by the employees and suppliers of the primary employer. *See, Local 761, International Union of Electrical Workers v. NLRB*, 366 U.S. at 682. Rather, picketing the neutral gate can be justified only if there has been "a pattern of destruction of the 'reserve' gate [system]." *Local Union 369, International Brotherhood of Electrical Workers*, 216 N.L.R.B. 141, 144, (1975), *enf'd* 528 F.2d 317 (6th Cir. 1976); *Local 76, International Brotherhood of Electrical Workers v. NLRB*, 742 F.2d 498, 501 (9th Cir. 1984).

D. *Who is the Primary Employer?*

Our inquiry is whether an object of the Union's picketing was to force a neutral employer to cease doing business with the primary employer. The Board contends that the Union violated Section 8(b)(4) by enmeshing both the neutral general contractor F&H, and its subcontractor, Regan, in its dispute with Walker, the primary employer. The Board supports its contention with regard to Regan by noting that the Union picketed with signs bearing Regan's name rather than Walker's name, and arguing that the Union did not have a primary dispute with Regan, but only with Walker.

The Union disputes the Board's contention that Regan was a neutral employer. The Union asserts that it had a dispute with Regan because Regan did not insure that Walker sought certification to hire apprentices, as is required for any contractor and subcontractor working on a public works project, under California law. California Labor Code § 1777.5. The statute places an affirmative duty on the contractor to insure that any subcontractor

*apply* for certification. There is no requirement that the employers hire apprentices. The Union thus contends that it had a right to picket Regan for failing to insure that Walker applied correctly for certification.

In view of the totality of the circumstances, it is clear that Regan's failure to insure that Walker got certification for apprentices was of minor importance to the Union and played an insignificant role, if any, in the Union's decision to picket. The Union had alternative means of expressing its displeasure. Turner, the Union's Business Agent, sat on the JATC and was well aware that the Union could have filed a complaint with the JATC. If the Union was truly interested in insuring that Walker complied with the apprentice rules, it could have so informed Regan and Walker. Both Todd, Regan's supervisor, and Walker testified that the Union never made any demands about hiring apprentices. In fact, Regan told Walker to apply for certification and Walker made an effort to apply for certification, but failed to follow the directions on the application packet. Consequently, the undersigned does not credit the Union's assertion that its motive in picketing Regan was Regan's failure to insure that Walker received certification for apprentices.

This conclusion is buttressed by the fact that Turner predicted trouble on the job long before he was aware of Walker's lack of certification. Turner testified that when he spoke with Todd and learned that Regan would use a non-union subcontractor to erect the buildings, he told Todd that there would be a problem on the job because Walker was non-union. Furthermore, the Union sought sanction from the Building Trades Council to picket Walker, not Regan.

Regan is not a primary employer with whom the Union had a dispute. The Union had no right to picket Regan, and by placing Regan's name on its picket signs it violated the fourth *Moore Dry Dock* criterion.

As noted above, however, violation of a *Moore Dry Dock* criterion, however, does not in itself warrant the conclusion that the Union had an improper purpose. F&H contributed to the error by placing Regan's name on the signs that it posted on the reserved gates. The gate signs were created *before* any picketers arrived at the job site. The Union made its decision to put Regan's name on the picket signs *after* the reserved gate system was set up. When the gate signs were changed on February 23 to add Walker's name, they still included Regan's name as a user of the primary gate. Neither F&H, Regan nor Walker protested the content of the picketers' signs.

F&H also contributed to the error by sending faulty telegrams to the Union notifying it of the reserved gate system. The telegrams sent in early February noted that Regan and its employees were to use Gate No. 1, but did not mention Walker or which gate the suppliers were to use. The February 23 mailgram identified both Regan and Walker as users of the primary gate.

Considering F&H's role in announcing Regan as the primary employer on its signs and in its telegrams, the Board will not be heard at this time to protest the use of Regan's name on the picket signs. Thus, the Union will only be found in contempt if it was attempting to enmesh F&H in its dispute with Walker.

D. *What Was the Object of the Picketing?*

1. *Threats to Shut Down the Site.*

The Board contends that on February 5, the Union threatened to close down F&H, based on the statements by Atkinson and Turner to Fregien. The Board argues that Atkinson, as a picketer, was "cloaked with the apparent authority to speak for the Union with regard to their picketing." *International Brotherhood of Electrical Workers, Local 6 and Intercontinental Hotels Corporation,*

286 N.L.R.B. No. 60, 128 L.R.R.M. (BNA) 1094, June 16, 1987. Statements made by the picketers during the course of the picketing may be used as evidence to ascertain the object of the Union's picketing. *Carpenters Union Local No. 1622 and Joiners of America and Robert Wood & Associates, Inc.*, 262 N.L.R.B. 1211, 1217-18, n.26 (1982), *enf'd* 768 F.2d 309 (9th Cir. 1986).

Although Atkinson made the statements attributed to him, he did not have authority to speak for the Union. Fregien was told that he should not speak with the picketers and that an attorney was available to answer his questions. Atkinson was instructed not to talk with anyone. He was given slips of paper to pass out in response to any inquiry. Thus, when he spoke with Fregien, it was without Union authorization. In light of the Union's instructions, the undersigned is not convinced that Atkinson's statement amounted to a "threat" within the meaning of Section 8(b)(4), nor that it is determinative of the Union's intent.

Turner, on the other hand, had authority to speak for the Union. However, it is not clear that the statement he made—that he was going to shut "that job" down—referred to F&H's job, which would be a threat of secondary activity. Rather, it could have been an expression of an allowed purpose to shut Walker's job down. *See, NLRB v. Ironworkers Local 433*, 850 F.2d 551, 556-7 (9th Cir. 1988); *NLRB v. Local 825, A,B,C,D, International Union of Operating Engineers*, 659 F.2d 379, 385 (3d Cir. 1981).

2. *Failure to Picket at the Primary Gate.*

The employees of both Regan and Walker generally used the proper gate, Gate No. 1, in entering and exiting the job site. The Union, however, failed to picket at the Regan gate except for approximately one hour on February 24. The Union is expected to wish to deliver its mes-

sage to both the employees and suppliers of the primary employers. That the Union only minimally picketed the primary gate suggests that the Union's picketing was really intended to appeal to the neutral parties present during its picketing. *See, e.g., Bexar Plumbing Co. Inc. v. NLRB*, 536 F.2d 634, 637 (5th Cir. 1976); *NLRB v. Northern California District Council of Hod Carriers*, 389 F.2d 721, 726 (9th Cir. 1968) ("Had [the Union's] object been trully primary it would at least have added a picket at the special gate [reserved for the primary employer's use] so that [the primary employer's] own employees would be informed of the labor dispute. . . .") Thus, this factor weighs in favor of a finding of secondary intent.

3. *Claims of Pollution of the Neutral Gate.*

No reliable evidence was presented of actual pollution of the neutral gate by primary employees or suppliers, except the single incident when supplier Nate Inman entered through it. Had the reserved gate system been validly established, this single instance would have been *de minimis* and would not have justified picketing a neutral gate.

4. *The Unmarked Road.*

The Board argues that the use of an unmarked third entrance to the site does not destroy the legitimacy of the reserved gate system. While entry or exit from a job site via an unmarked route may justify picketing the unmarked route, "it would not justify the picketing of the gate reserved for neutrals unless there is evidence that its neutrality has been compromised." *International Union of Operating Engineers, Local No. 12 and McDevitt & Street Company*, 286 N.L.R.B. No. 114, 127 L.R.R.M. (BNA) 1122, April 29, 1987). In that case, primary employees used an unmarked entrance from the main high-

way to enter the job site on four of the five days of picketing. The Board found that this behavior did not justify picketing the properly designated neutral gate.

Similarly, in *Nashville Building & Construction Trades Council and H.E. Collins Contracting Company, Inc.*, 172 N.L.R.B. 1138, 1140 (1968), *enf'd* 425 F.2d 385, 391 (6th Cir. 1970), the court found that entry to the job site by employees of the primary employer through an unauthorized, unmarked, unfenced area between the two reserved gates did not justify picketing the neutral gate. In neither case, however, did the entrances through unmarked areas raise any inference that the neutral gate was tainted, although they did deny the unions the opportunity to deliver their messages to their legitimate audiences.

On the other hand, in the instant case, an inference of taint did arise from the use of an unmarked entrance. At prisons, unlike other job sites, security is paramount and entrances are generally secured. The area around the prison was fenced in. The Union did not know that there was a third, unmarked road leading into the prison, nor did it have reason to believe that there was any entrance other than the two gates. The Union did believe that it was physically impossible for semi-trucks to navigate the road leading from the Regan gate. Both Nate Inman, the truck driver, and Leotice Wood, Walker's foreman, as well as Turner, testified that the road was too narrow. Semi-trucks were used to transport the pre-fabricated metal buildings, and the Union knew that buildings had been delivered, even though it did not observe the actual delivery. Consequently, it inferred that the semi-trucks must have used the neutral gate, as there was no other way to make a delivery. On the basis of this situation, the Union justifiably believed the neutral gate was tainted and that the reserved gate system could not function properly.

The Board argues that a union's subjective but mistaken belief that the neutral gate is tainted will not justify picketing it. However, the situation here was not that the gate system was invalidated by pollution of the neutral gate, but rather that F&H failed to establish a proper reserved gate system. The road it designated for use by Regan was physically inadequate to accommodate the suppliers' trucks. When the road proved to be unusable, F&H allowed the suppliers to use an unmarked road without informing the Union, thereby circumventing the Union and undercutting its right to deliver its message to suppliers. Thus, F&H failed in its duty properly to inform the Union of its distribution system. While Fregien did not know of the use of the George Reed road, F&H's Hayes and Snodgrass did, as did Regan's on-site supervisor.

The Court in *Linbeck Construction Corp. v. NLRB*, 550 F.2d 311, 317 (5th Cir. 1977), citing to two U.S. Supreme Court cases and a number of Board decisions, emphasized the importance of the union's right to picket gates used by suppliers. The *Linbeck* Court quoted the following language from *United Steelworkers of America v. NLRB* [*Carrier Corporation*], 376 U.S. 492, 499 (1964):

> "Picketing . . . has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations of which the strike is endeavoring to halt. In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral deliverymen furnishing day-to-day service essential to the plant's regular operations."

In *Linbeck*, the neutral employer undercut the union by informing it that the primary employer's suppliers would

only enter the site on weekday nights and weekends. It then changed its accounting system so that the neutral employer would accept deliveries during the day. The court held that "the Union was predictably misled by this maneuver." *Id*, at 319. The employer cannot benefit from the union's breach of a *Moore Dry Dock* requirement when "these parties have given the Union false and misleading information." *Id.* In *Linbeck*, the false information was as to when the primary employees would be on site; in this case, it was as to which road the suppliers would use. *See also Plumbers and Steamfitters Local Union No. 398 and Robbins Plumbing & Heating Contractors*, 261 N.L.R.B. 482, 486 (1982).

## CONCLUSION AND RECOMMENDATION

The Union's virtual failure to picket the primary gate weighs in favor of a finding of a secondary object of its picketing. The statement by one of the pickets also weighs on that side of the balance, although Turner's statement cannot be used to support such a finding. The picketing cannot be justified by the unproven or *de minimis* claims of pollution of the neutral gate. However, the reserved gate system was set up providing for the primary employers' suppliers, a legitimate recipient of the Union's message, a road which was unsuitable for their use. This could have been foreseen to lead, and did lead, to circumvention of the system by the suppliers, and the neutral employers knew it. The Union also knew that the system was being circumvented but did not know how, since the neutral employers did not tell it of the third road. Thus, the Union could not have picketed the entrance the suppliers used. Instead the Union picketed the gate it was led to believe, by the circumstances created by the neutral employers, was being used by the suppliers. On these facts, the undersigned cannot find clear and convincing evidence that an object of Respondents' picketing was secondary. The undersigned recom-

mends that the Board's petition that Respondents be held in contempt of the Court's order be denied.

Dated: September 27, 1989

/s/ Claudia Wilken
CLAUDIA WILKEN
United States Magistrate

Copies mailed to counsel
as noted below:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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C.A. No. 87-7222

NLRB Nos. 32-CC-1101
32-CC-1107

NATIONAL LABOR RELATIONS BOARD,
*Petitioners,*

v.

IRONWORKERS LOCAL 118, INTERNATIONAL ASSOC. OF BRIDGE STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO; WALT TURNER,
*Respondents.*

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ORDER

[Filed Sep. 19, 1990]

Before: BEEZER and KOZINSKI, Circuit Judges *

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Judge Robert Bonner was the third judge on this panel and left the court prior to receipt of the petition for rehearing en banc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 87-7222

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

IRONWORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO,
*Respondent.*

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# JUDGMENT ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[Filed Sept. 16, 1987]

Before:

This cause was submitted upon the application of the National Labor Relations Board for summary entry of a judgment against Respondent, Ironworkers Local 118, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, its officers, agents, and representatives enforcing its order dated 21 April 1987, in Case Nos. 32-CC-1101 and 32-CC-1107, and the Court having considered the same, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, Ironworkers Local 118, International Association of Bridge, Structural and Ornamental Iron-

workers, AFL-CIO, its officers, agents, and representatives, shall abide by said order (See Attachments).

SO ORDERED

Endorsed, Judgment Filed and Entered

DATE ISSUED: 29 October 1987

/s/ Cathy A. Catterson
CATHY A. CATTERSON
Clerk

By: /s/ Donald Lewis
DONALD LEWIS

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

IRONWORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO,
*Respondent.*

---

ORDER

1. Cease and desist from:

Picketing at or near entrances to construction jobsites established and reserved for the use of neutral persons, their personnel, visitors, and suppliers, or in any other manner, or by any other means, inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any articles, materials, or commodities, or to refuse to perform any other services, or coerce or restrain Amoroso Roebbelen, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Amoroso Roebbelen, or any other person, to cease doing business with Arnold Welding, or any other person.

2. Take the following affirmative action which is necessary effectuate the policies of the Act:

(a) Post in conspicuous places at its business office, meeting halls, or hiring halls within its geographical jurisdiction, including all places where notices to members are customarily posted, copies of the notice attached hereto as "Appendix."[9] Copies of this notice, to be fur-

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[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY

nished by the Regional Director for Region 32, shall be posted immediately upon receipt, after being duly signed on behalf of Respondent by its duly designated representative. Once posted, these notices shall remain posted for 60 consecutive days thereafter. Reasonable steps be taken by Respondent to insure that these notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of the said notice to the Regional Director for Region 32 for posting by Armoroso Roebbelen, this Company being willing, at all locations where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of receipt of this Decision and recommended Order as to what steps Respondent has taken to comply herewith.

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ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

# APPENDIX

## NOTICE TO EMPLOYEES

## POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The trial held in Modesto, California, in which we participated and had a chance to give evidence resulted in a decision that we had violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

WE WILL NOT, by picketing at or near entrances to construction jobsites established and reserved for the use of neutral persons, their personnel, visitors, and suppliers, or in any other manner, or by any other means, induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any articles, materials, or commodities, or to refuse to perform any other services, or coerce or restrain Amoroso Roebbelen or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Amoroso Roebbelen or any other person, to cease doing business with Arnold Welding, or any other person.

IRONWORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO
(Labor Organization)

Dated ———— By ————————————
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2201 Broadway, Post Office Box 12983, Oakland, CA 94604. Telephone No. (415) 273-6122.

(2)

No. 90-983



# In the Supreme Court of the United States

OCTOBER TERM, 1990

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IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

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*Washington, D.C. 20570*

## QUESTIONS PRESENTED

1. Whether the court of appeals properly concluded that petitioners were in civil contempt of the court's prior order enforcing an unfair labor practice decision of the National Labor Relations Board.

2. Whether the court of appeals properly imposed additional obligations, including an injunction against further violations and conditions assuring current and future compliance, to cure the effects of petitioners' contumacious conduct.

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OCTOBER TERM, 1990

No. 90-983

IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported, but the decision is noted at 908 F.2d 977 (Table), and the report of the Special Master (Pet. App. 11a-30a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990, and a petition for rehearing was denied on September 19, 1990. Pet. App. 31a. The petition for a writ of certiorari was filed on December 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In July 1986, petitioner Local 118 picketed a state prison project at the Sierra Conservation Center near Jamestown, California. On April 21, 1987, the Board concluded that Local 118's picketing at that project had violated Section 8(b)(4)(i) and (ii)(B) of the Act, 29 U.S.C. 158(b)(4)(i) and (ii)(B), by unlawfully enmeshing neutral employers in Local 118's primary labor dispute with Arnold Welding, a non-union contractor. Pet. App. 11a-12a. Finding that Local 118 had a demonstrated proclivity to violate the National Labor Relations Act, the Board broadly prohibited Local 118, its officers, agents, and representatives from:

> Picketing at or near entrances to construction jobsites established and reserved for the use of neutral persons, their personnel, visitors, and suppliers, or in any other manner, or by any other means, inducing or encouraging any individual employed by any person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any articles, materials, or commodities, or to refuse to perform any other services, or coerce or restrain * * * any * * * person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require * * * any * * * person, to cease doing business with * * any other person.

Pet. App. 2a-3a. On October 29, 1987, the court of appeals summarily enforced the Board's order. *Id.* at 2a-3a, 32a-37a.

2. On October 6, 1987, F & H Construction, Inc. (F & H) entered into a contract with the State of

California to build certain support facilities at the same project involved in the 1986 labor dispute. Pet. App. 3a, 12a. On October 21, 1987, F & H, the general contractor on the site, entered into a subcontracting agreement with Ron Regan Construction Company (Regan) whereby Regan agreed to supply and erect six prefabricated metal buildings. Regan, in turn, subcontracted the erection work on the building to Ron Walker Construction Company (Walker). Neither Regan nor Walker had a collective bargaining agreement with Local 118. *Ibid.*

Upon learning that Regan had selected Walker to perform the erection work, petitioner Walt Turner, Local 118's business agent, warned Regan that there would be labor problems on the job because Walker was non-union. Pet. App. 3a, 13a, 23a. Local 118 applied for, and received, approval from the Building Trades Council to picket Walker. *Id.* at 4a, 14a, 23a. Meanwhile, F & H established a reserved gate system at the prison site. Gate No. 1 was reserved for the use of Regan, its employees, suppliers and customers, while Gate No. 2 was established for all others. *Id.* at 3a-4a, 14a. Until February 23, the gate signs did not mention Walker specifically. *Id.* at 14a, 17a. The location of the gates was changed on February 4, 1988, and Local 118 was so advised. *Id.* at 15a. On occasion, an unmarked gate at the back of the project was used by Walker's or Regan's suppliers. *Id.* at 17a.

On February 5, 1988, Local 118 picketed the site with signs that read "Ron Regan Unfair to Iron Workers," despite the fact that it knew its dispute was with Walker, not Regan. Pet. App. 4a, 5a, 23a. Local 118 picketed only Gate 2, and when an F & H official stated that Local 118 was picketing the wrong

gate, Cecil Atkinson (one of Local 118's pickets), at the apparent direction of business agent Turner, replied that Local 118 did not care—that it was going to picket there and shut F & H down. *Id.* at 16a. In a later conversation that same day, Turner reiterated to the F & H official that Local 118 intended to shut the job down. *Ibid.*

Local 118 discontinued picketing between February 6 and February 22, but resumed picketing on February 23. Sometime that morning, the gate sign at Gate 1 was changed explicitly to require both Regan and Walker, their employees, suppliers and subcontractors, to use that gate. The sign at Gate 2 was also changed explicitly to reflect Walker's required access through Gate 1 only. Nevertheless, Local 118 did not picket Gate 1 (except for a one-hour period on February 24) and continued to picket neutral Gate No. 2. In addition, the picket signs mentioned only Regan, not Walker. Pet. App. 5a, 16a.

3. The Board commenced civil contempt proceedings against petitioners, alleging that Local 118 and Turner violated the court of appeals' judgment prohibiting secondary conduct by making unlawful threats, by picketing at gates reserved for neutral employers, and by picketing with signs naming a neutral employer (Regan). The court of appeals designated a Special Master to hear evidence and make recommended findings of fact and conclusions of law. On September 27, 1989, the Master filed her report recommending that Local 118 and Turner be absolved of all charges of civil contempt. Pet. App. 11a-30a.

Although the Master found the facts set forth above, she concluded that the evidence did not establish contumacious conduct by clear and convincing evidence. Specifically, the Master concluded that al-

though Regan was "not a primary employer with whom the Union had a dispute" and "the Union had no right to picket Regan," the Union's picketing was not contumacious because "F & H contributed to the error by placing Regan's name on the signs that it posted on the reserved gates" and "by sending faulty telegrams to the Union notifying it of the reserved gate system." Pet. App. 23a-24a. The Master also concluded that while Cecil Atkinson's statement to the F & H official weighed "in favor of a finding of a secondary object" in picketing, Turner's statement did not because it was too ambiguous. *Id.* at 24a-25a, 29a. The Master observed that Local 118's "virtual failure to picket the primary gate" suggested that Local 118's picketing "was really intended to appeal to the neutral parties present during its picketing." *Id.* at 25a-26a, 29a. In addition, Local 118 repeatedly picketed a neutral gate—normally compelling evidence of a secondary object. Nevertheless, the Master discounted that fact in this case because the existence and use of the unannounced and unmarked gate at the back of the project led to an "inference of taint." *Id.* at 26a-29a.

4. The court of appeals disagreed with the Master's report and found petitioners in contempt of the court's order. Pet. App. 1a-10a. The court recognized that the Board had the burden of establishing contempt by "clear and convincing evidence" and that a Master's finding of fact will not be disturbed unless "clearly erroneous." *Id.* at 4a-5a. The court found, however, that there was "no factual or legal support" for the Master's conclusion that the Union's picketing did not violate the court's previous order. *Id.* at 6a.

The court found it unnecessary to reach the issues whether the threats by Local 118 and the picketing

of the neutral gate violated the court order because "if the picketing was directed at a neutral employer for the purpose of pressuring that employer, the picketing violated our Order whether or not separate primary and neutral gates existed or were properly established or maintained." Pet. App. 5a-6a. With respect to the issue whether Local 118 improperly picketed Regan, the court determined, based on the Master's own factual findings, that the conclusions she reached were unsupported by "law or logic" (*id.* at 6a):

> [T]he Special Master concluded that because the general contractor, F & H, had named Regan in its gate sign for the primary gate and in the telegrams to Local 118, NLRB could not complain of picketing directed at Regan * * *. The Special Master's findings make no suggestion that Local 118 was confused on this point. Rather, the Special Master specifically found that Local 118 knew its dispute was with Walker, and the evidence supports that finding. Indeed, Turner sought from the Building Trades Council authority to picket *Walker*, not Regan, and the Special Master found "not credible" Local 118's testimony that it thought its dispute was with Regan.

*Ibid.* Accordingly, the court found that Local 118 and Turner violated the court order by knowingly picketing Regan, a neutral employer, with a purpose of "pressur[ing] [Regan] to cease using a non-union company." *Ibid.*

The court of appeals directed Local 118 and Turner to refrain from engaging in secondary boycott activity, to mail notices informing members that Local 118 and Turner were adjudged in civil contempt and would take certain actions to remedy their violation of the court's order, to submit a list to the

NLRB setting forth the names and addresses of the individuals to whom such notices were mailed, and to take certain additional steps to assure that future picketing would be lawful. Pet. App. 7a-9a. Specifically, the court of appeals directed petitioners to take the following actions:

> 8. Refrain from authorizing or permitting any of Local 118's members, representatives, or agents to picket unless and until Local 118 has conferred with those members, representatives, or agents and determined that the objects and manner of the proposed picketing are consistent with this Order and this Court's October 27, 1987 Order.
>
> 9. At the outset of any future picketing by Local 118's members, representatives, or agents, Local 118 and Turner shall give each picket a copy of this Order and this Court's October 27, 1987 Order, together with written instructions consistent with the terms of those Orders; and will require all persons assigned to picket line duty to sign a receipt indicating the date on which he or she picketed and that he or she has received, read, understands, and will comply with those Orders; and will submit such acknowledgements to NLRB's Regional Director.

*Id.* at 9a.

## ARGUMENT

1. Petitioners contend (Pet. 5-10) that the court of appeals' remedy for petitioner's contumacious conduct is vague, overly broad, and in violation of the First Amendment. There is no merit to these contentions. As this Court has explained, the "measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). Thus, where the "usual remedial provisions" incorporated in an enforced Board order have "proven insufficient" to deter contumacious conduct, " 'stronger medicine' " may be employed. *NLRB* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290, 294 (5th Cir. 1971). Given petitioners' established disregard of the court's previous order, the court of appeals acted well within its powers in imposing additional specific measures to assure future compliance. See Pet. App. 7a-10a.

Petitioners object in particular (Pet. 6-7, 8-9) to paragraphs 8 and 9 of the court's remedy; paragraph 8 requires Local 118 to confer with its members, representatives, and agents to assure that future picketing will be directed at primary employers, and paragraph 9 requires Local 118 to give copies of the court's orders and its instructions to the pickets. It is well settled, however, that "prohibition of inducement or encouragement of secondary pressure * * * carries no constitutional abridgement of free speech." *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694, 705 (1951). Paragraphs 8 and 9, which seek to ensure that the pickets fully understand their obligations on the picket line and are aware of potential sanctions for misconduct, are clearly appropriate measures to assure future compliance with the court's previous order.

Petitioners mistakenly contend (Pet. 6) that paragraph 9 requires that the Board be advised of picketing before it occurs. Rather, that paragraph, by its plain terms, requires that petitioners furnish the Board's Regional Office with evidence of compliance with the court's order only *after* the picketing has commenced. See Pet. App. 9a. Petitioners are also mistaken in contending (Pet. 8-9) that paragraph 9, which requires that the pickets certify that they have received, read, and understood the court's orders, prevents non-literate or non-English speaking pickets from participating on picket lines. Plainly, the court of appeals imposed that requirement to assure that pickets are informed of the consequences of their actions and not to exclude non-literate or non-English speaking pickets. Petitioners cannot seriously suggest that the Board or the court of appeals would consider petitioners in violation of the court's requirement if the union read the instructions and orders to any such pickets in their language and obtained equivalent certification from them. Cf. *United States* v. *Rylander*, 460 U.S. 752, 757 (1983).

2. Petitioners also contend (Pet. 11-16) that the court of appeals' order has infringed their right to freedom of association. They point specifically to paragraph 4, which requires that petitioners "sign, duplicate, and mail at their own expense, copies of this Order and the Notice to all members of Local 118, and submit a list of those members, officers, agents and representatives, and their addresses to the NLRB Regional Director" (Pet. App. 8a). Petitioners' challenge to that paragraph, however, is now moot. On November 9, 1990, Local 118 complied with paragraph 4's requirements by mailing Board

notices to its members and furnishing the Board a computerized list of the names and addresses of the persons to whom the notices were sent. See App., *infra* (Certificate re Compliance).

In any event, the Board cannot assure compliance with the mailing requirements of the court's order without the names and addresses of the recipients. The Board's (and the court's) interest in assuring that Local 118's members are informed of the court's decision is sufficient to override Local 118's concern for the privacy rights of its members. See *NAACP* v. *Alabama*, 357 U.S. 449, 464 (1958). Cf. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969) (upholding the Board's right to obtain employee names and addresses in furtherance of its legitimate statutory purpose of conducting fair elections).

3. Petitioners also contend (Pet. 19-21) that the court of appeals applied an improper standard of review to the Special Master's findings. As we have explained (p. 5, *supra*), the court expressly applied the "clearly erroneous" standard in reviewing the Master's factual findings and recognized that the Board had the burden of proving contempt by "clear and convincing" evidence. The court did not "mischaracterize[]" (Pet. 16) the Master's findings or "impl[y]" (Pet. 19) the necessary nexus to establish contumacious conduct. Rather, the court relied on the Master's own findings of fact to overturn her conclusion that an improper objective in picketing was not established. The court made that determination under the well-recognized principle that a reviewing court can reverse factual findings if the court "is left with the definite and firm conviction that a mistake has been committed." Pet. App. 4a, citing *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985).

As the court of appeals recognized, the touchstone in any secondary boycott case involving picketing is a determination of the union's objective in picketing. See Pet. App. 5a-6a. If *one* of the objectives of the union's picketing is to cause a neutral employer to cease doing business with a primary employer, a violation is shown even if that is not the *sole* objective of the union's action. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951). Based on the Special Master's findings, the court of appeals concluded that petitioners knew that Regan was a neutral employer and nevertheless picketed the job site with signs identifying Regan as the employer with which it had a dispute in order to put pressure on Regan. Pet. App. 5a-6a. Petitioners' assertion (Pet. 17-19) that they had reason to believe that Regan was a primary employer raises only a factual issue that does not warrant review by this Court.*

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* Petitioners assert that the court of appeals "mechanically applied" the criteria set forth in *In re Sailors' Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, 549 (1950), to determine that petitioners engaged in contumacious conduct. Pet. 16-17, 19. The court, however, did not find petitioners' picketing contumacious simply because of a "technical violation" (Pet. 16) of the *Moore Dry Dock* criteria. Rather, the court concluded, based on other evidence, that petitioners knew that Walker, not Regan, was the primary employer. Pet. App. 6a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1991

**APPENDIX**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No: 87-7222

NLRB Nos: 32-CC-1101 and 32-CC-1107

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*vs.*

IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, RESPONDENT

and

WALT TURNER, ADDITIONAL RESPONDENT IN CONTEMPT

---

CERTIFICATE OF A.R. (MICK) MYNSTED
RE: COMPLIANCE MAILINGS

I, A.R. (Mick) Mynsted, hereby declare as follows:

1. I am the Business Manager, Financial Secretary-Treasurer of Iron Workers Local Union No. 118. As such, I am in a position to have knowledge of the mailings made by said Local 118 in Compliance with the Order filed herein on July 26, 1990.

2. Local 118 has mailed a copy of the Order in this action, filed July 26, 1990, and a copy of the Notice to all of its members, officers, agents and representatives, as required by the Order filed July 26, 1990 in this action.

3. Said mailing was made at 10:00 a.m. on November 9, 1990 from the Main Post Office at Sacramento, California.

4. Attached hereto as "Exhibit A" and incorporated by reference, is a copy of the members, officers, agents and representatives and their addresses to whom said mailings were made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California this 19th day of November, 1990.

/s/ A.R. Mick Mynsted
A.R. (MICK) MYNSTED

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